

Below is an Opinion of the Court.


ELIZABETH PERRIS
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

In Re:)	
)	Bankruptcy Case No.
THEODORE LENALL COPELAND,)	08-45008-ELP
)	
Debtor.)	
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THEODORE L. COPELAND,)	Adversary No. 10-04026-ELP
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
EMIEL A. KANDI and his marital)	
community, DIVERSIFIED FINANCIAL,)	
INC., JASON M. WONG, and JUANITA C.)	
KANDI,)	
)	
Defendants.)	
)	

Debtor Theodore Copeland ("debtor") filed this adversary proceeding seeking a declaratory judgment, injunctive relief, and damages for willful violation of the automatic stay. Defendants are Emiel Kandi ("E. Kandi"), Diversified Financial, Inc. ("Diversified," which is E. Kandi's company), Juanita Kandi ("J. Kandi," who is E. Kandi's mother), and Jason

1 Wong ("Wong," who is the attorney who represented the three other
2 defendants in proceedings involving debtor). The court has stricken
3 debtor's request for declaratory judgment and injunctive relief, leaving
4 only the claims for willful violation of the automatic stay. Trial was
5 held in this adversary proceeding on July 14, 2010. Closing argument was
6 held on August 6, 2010.

7 As discussed below, the court concludes that defendants willfully
8 violated the automatic stay, but the damages proven by debtor are far
9 more limited than he sought.

10 FACTS

11 Based on the evidence and testimony presented at trial, I find the
12 following facts. To the extent the testimony relating to certain facts
13 was conflicting, the facts set out below reflect my determination of the
14 credibility of the witnesses.

15 In 2005, debtor acquired the vendee's interest in real property
16 ("the real property") under a land sale contract. Debtor failed to make
17 all of the regular contract payments, and the vendor, Martha Sutherland,
18 served on debtor a notice of intent to declare a forfeiture and cancel
19 the contract if debtor did not cure the defaults by October 1, 2008.

20 Debtor sought financing to fund the cure amount. Through a friend,
21 he contacted E. Kandi, the owner of Diversified. Debtor and E. Kandi
22 discussed having E. Kandi's company make a loan to debtor so he could pay
23 off the Sutherland land sale contract. Debtor believed that E. Kandi's
24 company would make the loan in time for him to avoid the forfeiture. As
25 October 1, 2008, drew nearer, however, debtor had difficulty getting in
26 contact with E. Kandi. Unbeknownst to debtor, instead of making a loan

1 to debtor to pay off the land sale contract, Diversified had acquired
2 Sutherland's interest in the land sale contract on September 30, 2008.
3 The funds Diversified used to purchase the contract from Sutherland came
4 from a loan by J. Kandi to E. Kandi. To secure that loan, Diversified
5 gave a trust deed on the real property to J. Kandi, which was recorded on
6 October 1, 2008. Also that morning, Diversified recorded a declaration
7 of forfeiture of debtor's rights in the property. The declaration of
8 forfeiture was premature, as debtor had until the end of the day on
9 October 1 to cure the default.

10 Because debtor had not obtained the loan from E. Kandi's company,
11 and therefore did not have the funds to cure the default and avoid the
12 forfeiture, he filed a chapter 13 bankruptcy petition in the afternoon of
13 the same day, October 1, 2008. At that time, he did not know that
14 Diversified had acquired Sutherland's interest in the real property or
15 that it had filed the declaration of forfeiture earlier in the day.

16 Soon thereafter, debtor learned of the forfeiture. On October 6,
17 2008, debtor called E. Kandi on the telephone and told him about the
18 bankruptcy filing. E. Kandi told debtor that Diversified had filed the
19 declaration of forfeiture and that he was going to evict debtor.

20 On October 17, 2008, when Diversified had not cancelled the October
21 1 forfeiture, debtor through counsel filed a state court action against
22 E. Kandi, J. Kandi, and Diversified for quiet title, to set aside the
23 forfeiture, and for damages based on various theories. The complaint
24 included further notice that debtor had filed bankruptcy on October 1,
25 2008, and provided the case number for the bankruptcy filing as well as a
26 copy of the Notice of Bankruptcy Case Filing.

1 The complaint was served on E. Kandi on October 30, 2008, although
2 he had been told about the lawsuit earlier in telephone conversations
3 with Klaus Elliott, the process server who sought to serve the summons
4 and complaint. Defendant Wong, representing the state court defendants,
5 filed a notice of appearance in state court on October 30, 2008. It is
6 unclear when J. Kandi was served. Although debtor's process server said
7 he left the summons and complaint for J. Kandi at her abode on October
8 18, 2008, the evidence established that she had moved from that address
9 before October 18. She testified, and I believe her, that she learned
10 about the lawsuit on November 6 or 7, 2008, when E. Kandi told her about
11 it.

12 The state court action proceeded, and on November 3, 2008,
13 notwithstanding the bankruptcy, Wong, representing the state court
14 defendants, filed their answer and alleged counterclaims against debtor
15 for breach of contract, tortious interference with business
16 relationships, quiet title, trespass, and injunctive relief.

17 On November 19, 2008, J. Kandi reconveyed the trust deed and
18 Diversified set aside the declaration of forfeiture. The Reversal of
19 Declaration [of] Forfeiture, signed by E. Kandi, indicated that
20 forfeiture could be reinitiated at a later date.

21 On November 21, 2008, Wong filed a motion for relief from stay on
22 behalf of Diversified, alleging both pre- and post-petition defaults and
23 seeking relief to pursue contractual and statutory remedies.

24 The court denied the motion for relief from stay on December 30,
25 2008, because counsel for Diversified did not appear for the hearing.
26 Diversified re-filed the motion for relief in January of 2009. The court

1 granted the motion and entered an order on March 20, 2009,¹ granting
2 relief "so that [Diversified] may pursue its state remedies to enforce
3 its security interest in the Property and/or as to enforcement of the
4 deed of trust that is the subject of Diversified Financial's motion."

5 After relief from stay was granted, Wong on behalf of Diversified
6 filed a notice of intent to forfeit. Debtor's state court counsel filed
7 a motion to restrain the forfeiture. According to Wong's testimony,
8 there was an agreed-upon order restraining the forfeiture.

9 On July 14, 2009, Diversified filed a second declaration of
10 forfeiture. Debtor filed a motion in bankruptcy court for clarification
11 of the March 20, 2009, order granting relief from stay. The bankruptcy
12 court held a hearing on September 9, 2009, and on that same day entered
13 an order clarifying that the earlier relief from stay allowed only
14 litigation in state court over the amounts due under the contract.
15 Diversified did not pursue the forfeiture any further after entry of this
16 order, but it has not cancelled the July 2009 notice of intent to
17 forfeit.

18 Debtor filed this complaint in 2010. The court has dismissed all
19 claims based on allegations of pre-petition conduct.

20 DISCUSSION

21 The filing of a bankruptcy petition operates as a stay of, among
22 other things, "the commencement or continuation" of a judicial proceeding
23 against the debtor on a pre-petition claim, and "any act to obtain
24

25 ¹ The original order granting relief from stay, dated March 13,
26 2009, contained the wrong real property address. The order was amended
on March 20, 2009, to correct the error.

possession of property of the estate" or to "create, perfect, or enforce any lien against property of the estate," 11 U.S.C. § 362(a)(1), (3), (4). Bankruptcy Code § 362(k)(1) provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."

Recovery for a willful stay violation requires a showing that the debtor sustained an injury from a violation that was willful. In re Roman, 283 B.R. 1, 7 (9th Cir. BAP 2002).

A "willful violation" does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional.

In re Pace, 67 F.3d 187, 191 (9th Cir. 1995) (quoting Pinkstaff v. U.S., 974 F.2d 113, 115 (9th Cir. 1992)). Knowledge of the bankruptcy "is the legal equivalent of knowing of the stay[.]" In re Zartun, 30 B.R. 543, 546 (9th Cir. BAP 1983). See also In re Dyer, 322 F.3d 1178, 1191 (9th Cir. 2003). "[A] good faith belief that the stay is not being violated 'is not relevant to whether the act was "willful" or whether compensation must be awarded.'" In re Peralta, 317 B.R. 381, 389 (9th Cir. BAP 2004)(citation omitted).

1. Did defendants' conduct violate the stay?

Debtor alleged that various actions by one or more defendants violated the automatic stay: (1) failure to set aside the declaration of forfeiture and recording of the trust deed until November 19, 2008; (2) filing an answer and counterclaims in the state court litigation on November 3, 2008; and (3) filing notices of intent to forfeit in March

1 and July 2009.

2 A. Delay in setting aside the recording of the trust deed and
3 declaration of forfeiture until November 19, 2008

4 The moment debtor filed his bankruptcy petition on October 1, 2008,
5 the automatic stay applied and protected him and property of the estate
6 from claims of creditors. Because the declaration of forfeiture had been
7 filed prematurely, its existence violated the automatic stay. The
8 recorded deed of trust also violated the stay, to the extent it clouded
9 title or otherwise impaired debtor's interest in the real property.

10 Failure to take reasonable steps to remedy an action that violates
11 the stay in itself is a stay violation. In re Ozenne, 337 B.R. 214, 221
12 (9th Cir. BAP 2006). For example, waiting 23 days after learning of the
13 debtor's bankruptcy case to dismiss a collection action against debtor
14 was found to be a willful stay violation. Eskanos & Adler, P.C. v.
15 Leetien, 309 F.3d 1210, 1212 (9th Cir. 2002).

16 J. Kandi reconveyed the trust deed on November 19, 2009, and
17 Diversified set aside the declaration of forfeiture on the same day.
18 Whether failure to reverse the actions before that date was unreasonable
19 and therefore constituted a willful violation of the automatic stay
20 depends on when defendants knew about the bankruptcy. I will address
21 that issue with regard to each defendant separately.

22 B. Filing an answer and counterclaims in state court

23 The policy behind the automatic stay is to preserve the status quo,
24 protecting "the estate from being depleted by creditors' lawsuits and
25 seizures of property in order to provide the debtor breathing room to
26 reorganize." In re Palmdale Hills Prop., LLC, 423 B.R. 655, 663 (9th

1 Cir. BAP 2009). Neither the language of § 362 nor the policy behind the
2 automatic stay requires the stay of actions brought by the debtor. In re
3 Merrick, 175 B.R. 333, 336-337 (9th Cir. BAP 1994). Nor does the stay
4 "prohibit a defendant in an action brought by a plaintiff/debtor from
5 defending itself in that action." In re Way, 229 B.R. 11, 13 (9th Cir.
6 BAP 1998).

7 Defending oneself is one thing; asserting a counterclaim is another.

8 A counterclaim is an independent cause of action As such, a
9 counterclaim is an "action or proceeding against a debtor" and
10 relief from the stay under § 362(a)(1) must be sought in order to
11 continue its prosecution postpetition.

12 229 B.R. at 14.

13 Thus, although defendants' answer to debtor's state court complaint
14 did not violate the stay, the filing of the counterclaims in state court
15 did. The counterclaims sought affirmative relief for alleged breach of
16 contract, tortious interference with business relationships, and
17 trespass. Defendants sought to quiet title and to enjoin debtor from
18 further use of the property. The filing of those counterclaims
19 constituted the commencement or continuation of a judicial proceeding
20 against debtor, and violated the automatic stay.

21 The counterclaims have not been dismissed. Defendants argue that
22 the counterclaims are moot, now that the declaration of forfeiture has
23 been reversed. Although the action for trespass, injunctive relief, and
24 quiet title may be moot, outstanding claims for damages for breach of
25 contract and tortious interference with business relationships are not.
26 And even if claims are moot, they continue to be a threat to debtor until
such time as they are dismissed.

1 Diversified obtained relief from stay in March 2008. But the
2 bankruptcy court's order granting relief from stay cannot be read to
3 grant relief to allow pursuit of the counterclaims. The motion for
4 relief did not mention the counterclaims, and Diversified did not ask for
5 relief to pursue those counterclaims in state court. In fact, Wong told
6 the court at the hearing on the motion that he was not suing debtor in
7 state court. Transcript of February 19, 2009 hearing at 6:19-21 (Exh.
8 I).

9 Filing the counterclaims violated the stay. Defendants' failure to
10 dismiss those counterclaims constitutes a continuing violation of the
11 stay.

12 C. Filing notices of intent to forfeit after the court granted
13 relief from stay on March 20, 2009

14 After a bankruptcy case is filed, a creditor violates the automatic
15 stay by filing a notice of intent to forfeit with regard to estate
16 property, unless the creditor has been granted relief from the automatic
17 stay. Both notices of forfeiture about which debtor complains were filed
18 after the bankruptcy court granted relief from stay on March 20, 2009.
19 Defendants argue that the stay had been lifted and so did not apply to
20 their filing of the forfeiture notices. Debtor argues that the
21 bankruptcy court granted very limited relief from stay, which only
22 allowed the parties to return to state court to litigate the contract
23 dispute, but did not extend to any action to commence forfeiture for
24 post-petition defaults. Therefore, he argues, the notices of intent to
25 forfeit went beyond the scope of the relief granted and violated the
26 stay.

1 The March 20, 2009, order granting relief from stay provided:

2 [T]he automatic stay is terminated as to Diversified Financial, its
3 successors and assigns, so that it may pursue its state remedies to
4 enforce its security interest in the Property and/or as to
5 enforcement of the deed of trust that is the subject of Diversified
6 Financial's motion. Creditor, its successors and assigns, may at
its option, offer, provide and enter into any potential forbearance
agreement, loan modification, refinance agreement or other loan
workout/loss mitigation agreement.

7 Order Granting Relief from Stay by Diversified Financial, Inc. at 1-2
8 (Exh. K).

9 The judge signed the proposed order that was submitted by Wong on
10 behalf of Diversified, with some changes, and the language tracked the
11 request for relief in the motion. However, at the hearings on the motion
12 on February 19, 2009, and March 12, 2009, the court made it clear that
13 any relief granted would simply allow the parties to return to state
14 court and litigate the contract issues there. E.g., Transcript of
15 February 19, 2009, hearing at 9:5-8, 12-14; 12:4-10; 13:18-21 (Exh. I);²
16 Transcript of March 12, 2009, hearing at 5:6-8, 17-18; 6:1-6 (Exh. J).
17 Wong failed to point out to the judge that the language of the proposed
18 order granting relief was broader than the relief that the court said it

20 ² For example, at the February 19, 2009, hearing, the court said,
21 "So I can lift the stay, as Mr. Wong is asking, let everything go up to
22 state court, and let you fight the issue of your contract dispute in
23 state court." Transcript of February 19, 2009, hearing at 9:12-14 (Exh.
24 I). At the March 12, 2009, hearing, the court repeated that the relief
25 to be granted was intended to be limited. The judge said, "So I'm going
26 to grant just simple relief from stay that just allows you to go back to
state court. . . . All I'm doing is granting you relief from stay to go
back." Transcript of March 12, 2009, hearing at 5:6-8; 17-18 (Exh. J).
The court continued: "But all I'm doing is granting relief from the stay
so that you can litigate the issue in state court. That's all that's
taking place today." Id. at 6:1-4.

1 was allowing.

2 The scope of the intended relief from stay was clarified at the
3 September 9, 2009, hearing. On debtor's motion, the court entered an
4 order that clarified the limited scope of the relief granted. That
5 order, entered on September 9, 2009, provided:

6 Creditor Diversified Financial received relief from stay on March
7 12, 2009 to pursue post-petition defaults and to pursue litigation
8 in Pierce County Superior Court. Creditor Diversified Financial may
9 not seek forfeiture for pre-petition defaults. Any attempt to seek
10 future forfeiture for post-petition defaults must be approved by the
11 Bankruptcy Court. All pre-petition defaults, to include payments to
Diversified, Pierce County tax assessor, and all other claims are
subject to the jurisdiction of the Bankruptcy Court. To the extent
that Pierce County Superior Court has ordered payment of pre-
petition defaults, the court [retains] jurisdiction over pre-
petition debts subject to the Chapter 13 payment plan.

12 Order Granting Motion to Clarify Amended Order Granting Relief from Stay
13 at 2 (Exh. N).

14 This order and the discussion at the September 9, 2009, hearing,
15 e.g., Transcript of September 9, 2009, hearing at 7:21-23 (Exh. M),
16 clarified that all the court was allowing was for the parties to return
17 to state court and litigate the contract dispute there. The order
18 clarified that Diversified would have to obtain relief from stay to
19 commence or pursue forfeiture for post-petition defaults.

20 Given the limited scope of the relief granted, as clarified in
21 September, the March and July 2009 notices of intent to forfeit the
22 property violated the automatic stay by pursuing forfeiture, which was
23 beyond the scope of the relief granted.

24 The March notice of intent to forfeit has been cancelled or
25 withdrawn, and has no more effect. The July notice of intent to forfeit
26 has been enjoined by the state court but it has not been cancelled or

1 withdrawn. The threat of forfeiture based on the enjoined notice of
2 intent to forfeit is an action to obtain possession of property of the
3 estate, which is stayed by § 362(a)(3). The failure to cancel the July
4 notice of intent to forfeit after entry of the September 9, 2009, order
5 clarifying the scope of the relief from stay is a continuing violation of
6 the stay.

7 2. Were the violations willful?

8 A creditor's conduct that violates the automatic stay is willful if
9 the creditor knew about the bankruptcy, which constitutes knowledge of
10 the automatic stay, and if the creditor's conduct was willful. Because
11 the dates each of the defendants learned about the bankruptcy are
12 pertinent to whether some of the stay violations were willful, I will
13 address separately when defendants each learned about the bankruptcy.

14 A. Juanita Kandi

15 There are two stay violations involving J. Kandi: the failure to
16 reconvey the trust deed until November 19, 2008, and the filing and
17 continued existence of her counterclaim in state court. J. Kandi's
18 defense is that she did not know about debtor's bankruptcy at the
19 pertinent time, so she could not have willfully violated the stay.

20 There is no evidence that J. Kandi had notice of the bankruptcy at
21 any time before debtor sued her in state court. The state court complaint
22 included an allegation that debtor had filed bankruptcy on October 1,
23 2008, thereby giving notice of the bankruptcy.

24 J. Kandi testified that she learned about the lawsuit on November 6
25 or 7, when E. Kandi told her about it.

26 Debtor argues that J. Kandi knew about the lawsuit, and therefore

1 the bankruptcy filing referenced in the complaint, on October 18, 2008.
2 He relies solely on the Declaration of Klaus Elliott. Elliott says that
3 he tried to serve the summons and complaint on E. Kandi at a Vista Place
4 West address on October 18. When no one was home, he telephoned J. Kandi
5 "who indicated to me that she did not want to have anything to do with
6 this matter." That testimony does not establish that J. Kandi knew on
7 October 18 that she was a defendant in the lawsuit or knew the content of
8 the complaint, in particular the information about the bankruptcy filing.

9 I believe J. Kandi's testimony that she did not find out about the
10 state court complaint until November 6 or 7, which was after the
11 counterclaim had been filed on her behalf on November 3 and only 12 or 13
12 days before she reconveyed the trust deed on November 19.

13 J. Kandi argues that the counterclaims in state court are not her
14 claims. First, she argues that none of the counterclaims assert claims
15 by her against debtor. Second, she argues that she did not even know
16 about the state court action on November 3, 2008, when the counterclaims
17 were filed, and so the counterclaims could not have been filed on her
18 behalf.

19 The pleading that asserts the counterclaims is not artfully written.
20 It names J. Kandi and E. Kandi as the two defendants asserting the
21 counterclaims. It is clear from the allegations that the breach of
22 contract, trespass, intentional interference with business relationships,
23 and injunctive relief claims do not relate to J. Kandi. The claim for
24 quiet title, however, does relate to her; a judgment quieting title would
25 benefit her. There was no reason to name J. Kandi as a defendant
26 asserting a counterclaim if none of the counterclaims affect her. I

1 conclude that the quiet title counterclaim was filed on behalf of J.
2 Kandi.

3 The fact that Wong filed a counterclaim against debtor on J. Kandi's
4 behalf on November 3 raises the question of how that could have been done
5 if J. Kandi did not yet know that debtor had sued her in state court. J.
6 Kandi testified that she did not know about the lawsuit on that date, and
7 had not hired Wong to represent her. Wong testified that he did not
8 discuss the lawsuit with J. Kandi before he filed the answer and
9 counterclaim on her behalf, and that he did not have any specific
10 agreement to represent her in this matter. He testified that he had
11 represented her in the past, and thought he needed to file the answer and
12 counterclaim quickly to preserve her rights in that litigation, despite
13 not having spoken to her about the lawsuit.

14 I believe the testimony and find that J. Kandi did not know about
15 the state court litigation or the bankruptcy before Wong filed the
16 counterclaim on her behalf on November 3.

17 Therefore, J. Kandi did not willfully violate the stay by filing the
18 counterclaim on November 3, because as of that date she did not know
19 about the state court action or the bankruptcy.

20 Failure to take reasonable steps to remedy an action that violates
21 the stay in itself is a stay violation. In re Ozenne, 337 B.R. 214, 221
22 (9th Cir. BAP 2006). Thus, after J. Kandi learned about the state court
23 action and the existence of the counterclaim, she had an obligation to
24 remedy the stay violation by dismissing her counterclaim. She argues
25 that the counterclaim is moot, but it continues to be a threat to debtor
26 until it is dismissed. She must dismiss the counterclaim to remedy the

1 violation of the stay.

2 Debtor also argues that J. Kandi's failure to reconvey the trust
3 deed until November 19, 2008, was a willful stay violation. She
4 reconveyed the trust deed less than two weeks after she learned about the
5 bankruptcy. I find that her action to remedy the stay violation by
6 releasing the trust deed was taken within a reasonable time after she
7 learned about the bankruptcy. She relied on her son to take care of the
8 reconveyance for her, which he did. Thus, J. Kandi did not willfully
9 violate the stay by failing to release the trust deed before November 19.

10 B. E. Kandi and Diversified

11 Debtor alleges that E. Kandi and Diversified willfully violated the
12 stay by (1) delaying the cancellation of the October 1, 2008, declaration
13 of forfeiture until November 19, 2008; (2) filing counterclaims against
14 him in state court; and (3) filing notices of intent to forfeit in March
15 and July 2009.

16 Diversified acted through E. Kandi, and his dealings with debtor
17 were on behalf of the entity. Therefore, the actions of E. Kandi were
18 also the actions of Diversified.

19 Debtor testified that he told E. Kandi in a telephone conversation
20 on October 6, 2008, that he had filed bankruptcy. E. Kandi recalls
21 having that telephone conversation, and testified that during that
22 conversation he told debtor that he was going to evict him. E. Kandi did
23 not deny that debtor told him of the bankruptcy filing in that
24 conversation, although he testified that he does not specifically recall
25 being told of it.

26 In light of E. Kandi's admission that he spoke to debtor on the

1 telephone on October 6, and that he told debtor he was going to evict
2 him, I find debtor's testimony convincing that he told E. Kandi about the
3 bankruptcy during that conversation. The purpose of debtor's bankruptcy
4 filing was to save his house; it is logical that he would have told E.
5 Kandi about the bankruptcy when they discussed the forfeiture on October
6 6.

7 Notice of the bankruptcy may be given "by any means and in any
8 manner[,]" including orally. In re Stucka, 77 B.R. 777, 781 (Bankr. C.D.
9 Cal. 1987). Therefore, the October 6 conversation was sufficient to put
10 E. Kandi and Diversified on notice that debtor had filed bankruptcy.

11 E. Kandi and Diversified argue that they did not know that the
12 declaration of forfeiture had been filed too early until they read the
13 allegations of the state court complaint after it was served on October
14 30. However, E. Kandi testified that his business is to obtain interests
15 in homes that are nearing foreclosure or forfeiture, and then completing
16 the forfeiture or foreclosure. In light of his self-expressed expertise
17 in the business and his testimony demonstrating familiarity with the
18 pertinent law, I do not find his testimony believable that, after he
19 spoke to debtor on October 6, he did not know that the declaration of
20 forfeiture had been filed a day early and needed to be set aside.

21 In any event, even "a good faith belief that the stay is not being
22 violated 'is not relevant to whether the act was "willful" or whether
23 compensation must be awarded.'" In re Peralta, 317 B.R. 381, 389 (9th
24 Cir. BAP 2004)(citation omitted).

25 E. Kandi and Diversified waited until November 19, 2008, nearly a
26 month and a half after learning of the bankruptcy filing, to cancel the

1 declaration of forfeiture. That delay was not reasonable and was a
2 willful violation of the stay. Even if I were to give them the benefit
3 of the doubt and conclude that they did not know about the bankruptcy
4 until the complaint was served on October 30, a three-week delay is still
5 unreasonable and therefore a willful violation, in light of their
6 obligation to remedy violations of the stay promptly.

7 The filing of the counterclaims on November 3 was also a willful
8 violation of the automatic stay, because E. Kandi knew about the
9 bankruptcy filing and intentionally filed the counterclaims.

10 Those counterclaims have not been dismissed, which is a continuing
11 violation of the stay. Defendants argue that the violation is not
12 willful, because the bankruptcy court's September 9, 2009, clarification
13 order did not order them to dismiss those counterclaims. But it is not
14 clear that the bankruptcy court even knew about the counterclaims at any
15 time in the relief-from-stay process.

16 Although defendants have not taken any action to pursue the
17 counterclaims since they were filed, including after the September 9
18 clarification, the existence of the counterclaims continues to violate
19 the stay. To remedy that continuing violation, defendants must dismiss
20 those counterclaims within 14 days of the date of this ruling.

21 As for the two notices of intent to forfeit that were filed after
22 relief from stay was granted in March 2009, I conclude that, although the
23 notices violated the automatic stay, the violations were not willful.
24 The language of the March 20, 2009, order granting relief from stay was
25 broad and could reasonably be interpreted to allow pursuit of state
26 remedies including forfeiture. Because defendants filed the notices of

1 intent to forfeit in reasonable reliance on the language of the relief
2 from stay order, those actions were not willful violations of the stay.

3 As with the counterclaims, however, the existence of the July 2009
4 notice of intent to forfeit (which is currently enjoined by the state
5 court) constitutes a continuing violation of the automatic stay. Because
6 the bankruptcy court did not order defendants to cancel or withdraw the
7 notice of intent to forfeit when it clarified the relief from stay in
8 September 2009, and defendants are restrained by the state court from
9 pursuing the notice of intent to forfeit, defendants' failure to cancel
10 or withdraw after September was not a willful violation.

11 However, E. Kandi made it very clear in his testimony at trial that,
12 if the state court lifts its injunction, he fully intends to pursue
13 forfeiture, which he says he can do on 10 days' notice. Given E. Kandi's
14 attitude and demeanor at the trial, I am not persuaded by his later
15 testimony, given after he had spoken with his counsel, that he knew he
16 would have to obtain relief from stay before moving forward with the
17 forfeiture. E. Kandi's attitude was that he had a right to forfeiture on
18 10 days' notice, and I do not find his assurance that he would obtain
19 relief from stay before taking further action on the July 2009 notice of
20 intent to forfeit sufficient.

21 The pending notice of intent to forfeit remains a threat to debtor's
22 interest in the real property. Contrary to defendants' argument, this
23 notice does not simply maintain the status quo. If for some reason
24 debtor were not in bankruptcy when the state court terminated the
25 injunction restraining the forfeiture, according to E. Kandi, state law
26 allows him to declare a forfeiture on 10 days' notice, rather than the 90

1 days' notice that would apply if he had to start the process over. Thus,
2 the failure to cancel the notice of intent to forfeit, which was filed in
3 violation of the automatic stay, does not simply maintain the status quo
4 but instead gives E. Kandi and Diversified an advantage that it obtained
5 in violation of the stay.

6 Therefore, because the existence of the notice of intent to forfeit
7 continues to threaten debtor's interest in the real property, defendants
8 E. Kandi and Diversified must cancel the July 2009 notice of intent to
9 forfeit within 14 days of the date of this ruling.

10 C. Jason Wong

11 Debtor claims that attorney Wong, through his representation of the
12 other defendants, willfully violated the stay by participating in
13 defending the state court lawsuit filed by debtor in October 2008, filing
14 the counterclaims on behalf of his clients, and filing the notices of
15 forfeiture in March and July 2009.

16 Wong filed a notice of appearance in state court on October 30,
17 2008. Thus, he had to have known about the state court complaint,
18 including the allegation about debtor's bankruptcy filing, by that date.

19 Because Wong knew about debtor's bankruptcy before he filed the
20 counterclaims on behalf of his clients, he willfully violated the stay by
21 filing the counterclaims. Although the bankruptcy court later granted
22 relief from stay in the March 20, 2008, order, that relief did not allow
23 the filing of counterclaims for affirmative relief, nor did that order
24 grant relief retroactively to annul the stay violation that occurred when
25 Wong filed the counterclaims without having first obtained relief from
26 the stay.

1 Although the counterclaims have not been dismissed and continue to
2 constitute a violation of the automatic stay, Wong testified that he no
3 longer represents defendants in the state court action. Therefore he
4 cannot take any action on their behalf in the state court litigation. I
5 conclude that he is not responsible for the continuing violation that
6 exists by virtue of the failure to dismiss the counterclaims.

7 As for the notices of forfeiture, it is not clear whether Wong filed
8 the first post-petition notice. If he did, I have explained that the
9 stay violation resulting from the filing was not willful because it was
10 done in reasonable reliance on the court's relief from stay order.

11 E. Kandi testified that he filed the second notice of intent to
12 forfeit without Wong's assistance. Wong therefore is not responsible for
13 any violation arising out of the continued existence of that second
14 notice of intent to forfeit.

15 3. What are the damages from the willful violations?

16 Defendants argue that debtor has not established any damages
17 resulting from any willful violation of the stay. Debtor seeks damages
18 for (1) emotional distress; (2) attorney fees incurred in the state court
19 action; and (3) punitive damages.

20 A. Emotional distress damages

21 Emotional distress damages may be awarded for violation of the
22 automatic stay under § 362(k). In re Dawson, 390 F.3d 1139 (9th Cir.
23 2004). "[T]o be entitled to damages for emotional distress under
24 § 362(k), an individual must (1) suffer significant harm, (2) clearly
25 establish the significant harm, and (3) demonstrate a causal connection
26 between that significant harm and the violation of the automatic stay (as

1 distinct, for instance, from the anxiety and pressures inherent in the
2 bankruptcy process)." Id. at 1149. Emotional distress damages are
3 recoverable even in the absence of economic injuries. Dawson, 390 F.3d
4 at 1146-1149.

5 "Fleeting or trivial anxiety or distress does not suffice to support
6 an award; instead, an individual must suffer significant emotional harm."
7 Id. at 1149. Emotional distress damages may be established in several
8 ways: corroborating medical evidence; non-expert testimony about
9 manifestations of mental anguish; or circumstances that make it obvious
10 that a reasonable person would suffer significant emotional harm. Id. at
11 1149-1150.

12 Debtor established that defendants' conduct caused him emotional
13 distress. Debtor testified that he cannot sleep and spends all of his
14 time working on saving his house, because defendants continue to take
15 actions to take debtor's house, despite the bankruptcy stay. He
16 described a fear, based on his interaction with defendants, that the
17 bankruptcy stay will not protect his house from forfeiture.

18 Debtor is a person of limited means. He is self employed and earns
19 his living repairing copy machines. He filed his bankruptcy case without
20 a lawyer and has prosecuted this adversary proceeding pro se. When the
21 bankruptcy filing was insufficient to cause E. Kandi and Diversified to
22 stop the forfeiture, and E. Kandi had threatened debtor with eviction,
23 debtor was so frightened that he borrowed money from his mother to retain
24 state court counsel to help him save his house. Despite debtor's chapter
25 13 case, the threat of forfeiture remains.

26 Debtor's fiance testified that debtor's personality has changed due

1 to his distress over dealing with E. Kandi and Diversified in trying to
2 keep his house from forfeiture. She testified that he does not sleep,
3 that their personal relationship has become strained, debtor is very
4 tense, and he is no longer working as much as he did before these events
5 occurred. According to her, debtor is stressed because he does not feel
6 that he is being protected by the bankruptcy stay the way he is supposed
7 to be protected.

8 Having heard debtor's and his fiance's testimony about the emotional
9 distress defendants' conduct has caused and how it has changed his
10 quality of life and having observed their demeanor, having considered
11 that E. Kandi threatened to evict debtor even after being aware of
12 debtor's bankruptcy, and having considered that it is debtor's residence
13 that is at issue, I am convinced that debtor has suffered significant
14 emotional harm from E. Kandi's and Diversified's conduct between October
15 1, 2008, and March 20, 2009, and from Wong's conduct between November 3,
16 2008 and March 20, 2009. This is distress that goes beyond emotional
17 distress caused by filing bankruptcy. Considering the conduct of
18 defendants in doggedly pursuing forfeiture from the date of bankruptcy
19 forward, the fact that debtor has suffered significant emotional distress
20 is reasonable. The continued threat of forfeiture of a home in which
21 debtor believes he has significant equity, along with debtor's
22 understandable fear that the automatic stay does not protect him, clearly
23 has caused debtor significant emotional harm.

24 I conclude that debtor is entitled to emotional distress damages
25 totaling \$10,000 for the willful stay violations, all of which shall be
26 payable by E. Kandi and Diversified, and \$5,000 of which shall also be

1 payable by Wong. Debtor's distress is significant, and was caused by the
2 conduct of E. Kandi and Diversified in delaying the cancellation of the
3 declaration of forfeiture in October and November 2008, and by E. Kandi,
4 Diversified, and Wong in filing and not dismissing the counterclaims,
5 including the counterclaim for trespass.

6 Although E. Kandi's and Diversified's filing of the March and July
7 2009 notices of intent to forfeit were violations of the stay, they were
8 not willful violations because the actions were taken in reasonable
9 reliance on the bankruptcy court's March 20, 2009, order granting relief
10 from stay, and it was only after the court clarified the order granting
11 relief from stay in September 2009 that it became clear that the court
12 did not intend to allow stay relief to pursue forfeiture. Thus, any
13 emotional distress that was caused by those notices is not recoverable as
14 damages in this case.

15 I find that the willful violation by J. Kandi, which was her failure
16 to dismiss her counterclaim, did not cause any emotional distress.
17 Debtor never dealt with her and her involvement in the transaction was
18 peripheral. Although she must dismiss her counterclaim to avoid
19 willfully violating the stay going forward, I do not find any emotional
20 harm caused by her failure to dismiss her moot counterclaim.

21 B. Attorney fees

22 "[A]n individual injured by any willful violation of a stay provided
23 by this section shall recover actual damages, including costs and
24 attorneys' fees, and, in appropriate circumstances, may recover punitive
25 damages." § 362(k)(1). "Actual damages" are amounts "awarded . . . to
26 compensate for a proven injury or loss; damages that repay actual

1 losses.'" Sternberg v. Johnston, 595 F.3d 937, 947 (9th Cir. 2010)
2 (quoting Black's Law Dictionary 416 (8th ed. 2004)) (omission in
3 original).

4 Attorney fees incurred in enforcing the automatic stay and remedying
5 the stay violation are "actual damages" and therefore recoverable.

6 § 362(k); Sternberg, 595 F.3d at 945-948. Attorney fees incurred in
7 seeking damages for violation of the stay are not recoverable. Id.

8 In determining the amount of attorney fees that should be awarded
9 for violation of the stay, the court looks at (1) whether the expenses or
10 costs resulted from the stay violation, and (2) whether those expenses or
11 costs were reasonable or could have been mitigated. In re Roman, 283
12 B.R. 1, 12 (9th Cir. BAP 2002).

13 Debtor seeks \$38,647.66 in attorney fees incurred in his state court
14 litigation with defendants. The state court action includes claims
15 beyond claims to avoid the consequences of automatic stay violations and
16 to enforce the automatic stay. In particular, the state court litigation
17 includes claims for fraud, negligent misrepresentation, violation of
18 consumer protection laws, violation of lending laws, and fraudulent
19 conveyance. Debtor is entitled to attorney fees as damages for willful
20 violation of the automatic stay only for fees relating to the October 1,
21 2008, forfeiture. Fees incurred in pursuing the other claims in the
22 state court action are not allowable, as they are not related to the
23 willful stay violations.

24 Debtor incurred substantial attorney fees in state court as a result
25 of the two notices of intent to forfeit that were filed in March and July
26 2009. As I explained above, those notices violated the automatic stay,

1 but the violations were not willful. Therefore, debtor is not entitled
2 to recover his attorney fees incurred in disputing Diversified's March
3 and July 2009 notices of intent to forfeit.

4 I have reviewed debtor's entire itemization of attorney fees and
5 costs that he claims as damages. I find no attorney fees or costs
6 associated with the filing of the counterclaims. Debtor has never
7 answered the counterclaims, and there does not appear to have been any
8 litigation or other legal work performed related to those counterclaims.
9 Therefore, there are no attorney fee damages for willful violation of the
10 stay arising from the filing or continued existence of the counterclaims.

11 There were attorney fees and costs resulting from E. Kandi's and
12 Diversified's delay in cancelling the October 1, 2008, declaration of
13 forfeiture. Between October 7, 2008, and October 24, 2008, debtor
14 incurred \$3,003 in attorney fees and \$256.20 in costs in initiating the
15 state court action. Between October 30, 2008 (the first date on the next
16 attorney fee invoice), and November 18, 2008 (the day before the
17 declaration of forfeiture was set aside), debtor incurred \$3,144.75 in
18 attorney fees, \$70.00 in service fees, \$5.00 for parking for a November
19 14, 2008, hearing, and \$24.24 in finance charges. This totals \$6,533.19.

20 The attorney work itemized for November 19, 2008, indicates that
21 counsel knew by that time that the declaration of forfeiture had been set
22 aside. Therefore, fees for the work on November 19 are not part of the
23 damages for the violation of the automatic stay.

24 The state court complaint contained a number of claims besides the
25 claims relating to setting aside the declaration of forfeiture. The
26 detail contained in the attorney invoices, however, indicates that the

1 bulk of the work done up to November 18, 2008, related to the attempt to
2 get the declaration of forfeiture set aside. I conclude that debtor is
3 entitled to 75 percent of his fees and costs in the state court
4 litigation up to and including fees charged on November 18, 2008, for a
5 total of \$4,900.

6 Defendants argue that debtor should have mitigated his damages by
7 attempting to get them to set aside the declaration of forfeiture without
8 filing the state court lawsuit. In light of the attitude of E. Kandi in
9 his testimony at trial, which demonstrated a lack of concern for
10 complying with the bankruptcy stay absent official notice of the
11 bankruptcy filing as well as his view that he need do nothing while
12 investigating the claim that the October 1, 2008, declaration of
13 forfeiture was filed prematurely and therefore invalid, I am not
14 convinced that there would have been a meaningful savings if debtor's
15 attorney would have made a pre-litigation demand to set aside the
16 declaration of forfeiture. The state court action, or a motion in
17 bankruptcy court, was necessary to get E. Kandi to remedy the stay
18 violation.

19 C. Punitive damages

20 Punitive damages will be awarded if a defendant's conduct was
21 malicious, wanton or oppressive, or if the violator engaged in
22 "egregious, intentional misconduct." In re Stinson, 295 B.R. 109, 122
23 (9th Cir. BAP 2003), aff'd in part, rev'd in part on other grounds, 128
24 Fed.Appx. 30 (9th Cir. 2005)(unpublished); In re Ramirez, 183 B.R. 583,
25 590 (9th Cir. BAP 1995).

26 Defendants' willful violations of the stay were not malicious,

1 wanton, or oppressive. Although they pursued forfeiture of the real
2 property until debtor filed the state court action to stop them, they
3 cancelled the declaration of forfeiture before they were ordered to do
4 so. Although they have not dismissed the counterclaims or cancelled the
5 July 2009 notice of intent to forfeit, they have maintained the status
6 quo since the bankruptcy court clarified the scope of the order granting
7 relief from stay. The bankruptcy court did not order cancellation of the
8 notice of intent to forfeit or dismissal of the counterclaims.

9 Because defendants' conduct was not malicious, wanton, or
10 oppressive, I will not award punitive damages.

11 CONCLUSION

12 Defendants violated the automatic stay. Debtor is entitled to
13 \$10,000 in damages for emotional distress caused by the willful stay
14 violations. Debtor is also entitled to \$4,900 in damages from E. Kandi
15 and Diversified for the attorney fees incurred in obtaining cancellation
16 of the declaration of forfeiture. There were no proven damages from J.
17 Kandi's willful violation in failing to cause her counterclaim to be
18 dismissed.

19 I conclude, however, that the continued pendency of the
20 counterclaims in state court and the pending notice of intent to forfeit
21 constitute an on-going violation of the stay that must be remedied
22 immediately. Defendants E. Kandi, Diversified, and J. Kandi must dismiss
23 the state court counterclaims, and E. Kandi and Diversified must cancel
24 the notice of intent to forfeit within 14 days of the date of this

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26 ////

1 ruling. Their failure to do so will constitute a failure to obey a
2 court order, subject to sanctions for contempt.

3 The judgment will be entered contemporaneously with the issuing of
4 this Memorandum Opinion.

5 ###

6 cc: Thomas P. Quinlan
7 Jeffrey Kestle
8 Theodore L. Copeland
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